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Foothill Sierra Pest Control, Inc. and General Teamsters Local 439. Cases 32–CA–22419

June 18, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND KIRSANOW

On November 22, 2006, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Foothill Sierra Pest Control, Inc., Sonora, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that some of the judge's findings are the product of bias. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

We further find no merit in the Employer's allegations of bias on the part of the Board agents, based on their having allegedly inserted false statements into affidavits. The record shows that the witnesses had a reasonable opportunity to review their affidavits to make changes and corrections, and did make changes.

In its exceptions, the Respondent also moves to reopen the record to introduce the minutes of a managers' meeting held on December 14, 2005, to call additional witnesses, and to recall certain witnesses who testified at the hearing. The evidence the Respondent seeks to introduce is not newly discovered nor was it previously unavailable as required by Board Rules and Regulations, Sec. 102.48(d)(1). Accordingly, we deny the Respondent's request to reopen the record.

We find it unnecessary to rely upon the judge's inference of knowledge based upon the allegedly contrived reasons for Kirtlye Wheeler's discharge.

² We have modified the recommended Order to conform to the Board's standard remedial language, and we have substituted a corresponding new notice.

“(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 18, 2007

Wilma B. Liebman, Member

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge any of you for supporting General Teamsters Local 439 or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Kirtlye Wheeler full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kirtlye Wheeler whole for any loss of earnings and other benefits resulting from her discharge.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kirtlye Wheeler, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

FOOTHILL SIERRA PEST CONTROL, INC.

Gary M. Connaughton, for the General Counsel.
Peter Nordstrom, Office Manager (Foothill Sierra Pest Control)) of Sonora, California.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in Sonora, California on September 20 and 21, 2006 upon a Complaint and notice of hearing (the complaint) issued June 30, 2006¹ by the Regional Director for Region 32 of the National Labor Relations Board (the Board) based upon charges filed by General Teamsters Local 439 (the Union.) The complaint alleges that Foothill Sierra Pest Control, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discharging its employee Kirtlye Wheeler because she engaged in union or other protected concerted activities. The Respondent essentially denied all allegations of unlawful conduct.

I. ISSUE

Did the Respondent violate Section 8(a)(1) and (3) of the Act by discharging employee Kirtlye Wheeler because she engaged in union or other concerted, protected activities?

II. JURISDICTION

The Respondent, a California corporation with an office and place of business located in Sonora, California (the facility) has been engaged in sale of weed and pest control services to residential and business customers.² During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5000, which originated outside the State of California. The Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

During the period relevant to this matter, Jim Tassano (Mr. Tassano) was president and co-owner of the Respondent with David Lepape (Mr. Lepape), among others, serving as supervisor. The Respondent employed 10 to 12 individuals as applica-

tors, i.e. workers who sprayed herbicides and pesticides on customers' properties. One of the Respondent's applicators was Kirtlye Wheeler (Ms. Wheeler), hired as an applicator/trainee on November 20, 2004.³ Ms. Wheeler received her applicator license in 2004 and passed the required California state examination in February. From November 2004 to May, Ms. Wheeler worked for the Respondent as a weed control applicator.⁴

On March 21, Ms. Wheeler sprayed sterilant chemicals on extensive ornamental landscape borders at the residential property of the Respondent's customer, Joseph Cygal, (the Cygal job or the Cygal property). Thereafter Mr. Cygal complained that the spraying had killed plants in his borders. On about April 19, Mr. Lepape, accompanied by Ms. Wheeler, inspected the Cygal property and concluded that Ms. Wheeler had applied chemicals contraindicated for use on ornamental plants, resulting in the destruction of numerous plants.⁵ While at the Cygal property, Mr. Lepape contacted Mr. Tassano by cell phone, informed him that Ms. Wheeler had sprayed sterilants in Mr. Cygal's flower beds, and described the damage. Ms. Wheeler told Mr. Lepape that she would do whatever it took to rectify the situation, including resigning or paying for the damaged plants. Mr. Lepape told her not to worry about it, saying that such mistakes happened to everyone. When Mr. Lepape returned to the facility, he once again described the damage at the Cygal property to Mr. Tassano.

In May, Amador California County Department of Agriculture commenced an investigation of the Respondent (the county investigation) prompted in large part by the problems at the Cygal job. In late May, the Respondent received the estimate of damages stemming from the Cygal job: \$2229. In a conversation with Mr. Tassano, Ms. Wheeler offered to pay the damages and/or to resign, but Mr. Tassano declined her offer.

When the weed season ended in May, the Respondent transferred Ms. Wheeler, along with most of the weed control applicators, to pest control. Mr. Lepape urged Mr. Tassano to assign Ms. Wheeler permanently to pest control or to fire her. Mr. Tassano refused, saying he wanted to assign Ms. Wheeler back to weed control when the weed season resumed because he thought she could learn from her mistakes. On June 10, the Respondent paid the full appraised amount of damages (\$2229) to Joseph Cygal in settlement of his claim.⁶ Although, during the course of the Cygal job problem, Mr. Lepape informed Ms. Wheeler that she had used the wrong products in the wrong places and reviewed chemical labels with her, the Respondent neither disciplined nor requested reimbursement from Ms.

³ During the initial period of her employment with The Respondent, Ms. Wheeler went by the name Kirtlye Ferrari.

⁴ The Respondent sprays predominantly for weeds during the months of October/November to April/May, called the weed season. Spraying done in the intervening months, called the pest season, mainly addresses pests.

⁵ Sterilants are not to be used in crop settings such as ornamental areas; there is no dispute that Ms. Wheeler applied sterilants to the ornamental borders at the Cygal property. It was later determined that approximately 80 ornamental plants had been destroyed.

⁶ The Respondent had previously had to pay damages on jobs performed by other employees, including one of Dylan Smith's 2 years previously, the cost of which was about \$2000.

¹ All dates herein are 2005 unless otherwise specified.

² Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

Wheeler for her mistake on the Cygal job.⁷

On October 12, the Amador County Department of Agriculture issued its investigatory findings, notifying the Respondent, *inter alia*, that Ms. Wheeler⁸ had applied herbicide chemicals at the Cygal job that were not labeled for use in ornamental landscape sites. The county proposed to assess the Respondent a fine of \$2400 and notified the Respondent of its right to a hearing on the proposed action, which the Respondent elected. When Mr. Tassano informed Ms. Wheeler of the proposed fine, she again offered to resign and/or pay the fine. Although the Respondent had never before been fined for misuse of chemicals, Mr. Tassano told Ms. Wheeler that neither action was necessary and that everything was fine.

In October, weed control season having commenced, Mr. Tassano told Ms. Wheeler that he wanted her to return to weed control. Ms. Wheeler said she was not comfortable with returning to weed control because of what had happened. Although Mr. Tassano said he could really use Ms. Wheeler on the weed control team, he agreed to her remaining on pest control.

In November, the Respondent announced an alteration in its employee compensation procedures, essentially changing commissions from weekly to monthly imbursement. Believing the change significantly decreased employees' wages, Ms. Wheeler contacted the Union. During the latter half of November and early December, Ms. Wheeler met with union representatives and thereafter discussed potential union representation with about five other employees.

On November 30, Mr. Tassano and Mr. Lepape attended a hearing conducted by the Amador County Department of Agriculture regarding the county investigation. At the hearing, the county presented the Respondent with a binder that contained the evidence collected by the county during its investigation. The binder included color photographs of the damaged Cygal property. The photographs portrayed expanses of ornamental borders in which dead foliage and desiccated stalks predominated. Mr. Tassano did not look at the photographs until the following day. When he did, he was shocked by the enormity of the damage done at the Cygal job. At some time thereafter, Mr. Tassano reviewed other damages for which Ms. Wheeler had been responsible: the Terry Jewell job on February 29, the Rich Patane job on March 21, the Kristi Jarvis job on April 5, and the Al Dunkel job on April 13, the Jay De Oliveri job on April 21, and the Glen Dooley job on April 25.⁹ According to Mr. Tassano, he also considered that in late November or early December he had to "[get] on [Ms. Wheeler's] case" about spraying pesticide on grape vines, which was a serious illegal-

ity even though the customer had requested it.¹⁰

On about December 9, Mr. Tassano and his wife, Ilene (Mrs. Tassano), learned that two staff group photos that hung in the main employee room at the facility had been defaced: on each photo a large black "X" had been drawn through Mrs. Tassano's face.¹¹ In the days following, Mr. Tassano called a couple of employees into his office to ask if they had defaced the photos; he did not ask Ms. Wheeler, and no one suggested she was responsible.

Mr. Lepape became aware that the Respondent's employees were engaging in union organizational activity when he overheard seven or eight employees openly discussing the Union. He overheard the employees say that Ms. Wheeler had started things with the Union, and at some point, he learned there was going to be a union meeting at Ms. Wheeler's house.¹² Based on what he heard, Mr. Lepape believed that Ms. Wheeler was "driving" the organizational effort. Shortly thereafter, Mr. Lepape told Mr. Tassano he had overheard employees talking about the Union. Mr. Tassano told Mr. Lepape he had already heard something about that. Mr. Tassano testified that his memory was "cloudy" as to who had talked to him about the Union. With regard to Ms. Wheeler's activity, Mr. Tassano said that prior to her discharge, he was only aware that she was one of the employees interested in the Union but that he knew nothing about a union meeting to be held at her home until given that information during the Board's investigation. Rather, Mr. Tassano said, he believed Steven Deaver was leading the union organizational movement, as he had heard a union meeting was going to be held at his house. I cannot accept Mr. Tassano's testimony. In the absence of testimony to the contrary, it is reasonable to infer that Mr. Lepape fully recounted to Mr. Tassano what he had overheard about employee interest in the Union, and a full account must have included his knowledge of Ms. Wheeler's involvement, including the meeting to be held at her home.

Notwithstanding absence of any evidence impugning her, at some point Mr. Tassano came to believe that Ms. Wheeler was responsible for the defacement of his wife in the group photographs.¹³ On the evening of December 14, the unresolved pho-

⁷ Mr. Lepape testified his discussion with Ms. Wheeler constituted "discipline." To Mr. Tassano discipline was "training." He worked under the assumption that employees were trying to do their best and when shown how to do a task correctly, they would comply. Under that definition, Mr. Tassano considered that Mr. Lepape had "disciplined" Ms. Wheeler. I find that the Respondent did not discipline Ms. Wheeler, as the term is commonly understood, *i.e.*, in any way that impacted employment duration or compensation.

⁸ Ms. Wheeler is referred to in the report as "Kay Ferrari."

⁹ The Respondent's average applicator had no more than one to two damage claims per year.

¹⁰ According to Mr. Tassano, Ms. Wheeler told him of the incident, and employee James Martin testified that 1 to 2 months before she was fired, Ms. Wheeler told him the "boss" was annoyed because she had sprayed grapevines. Ms. Wheeler denied both the incident and any recounting of it. I accept the testimony of James Martin who seemed forthright and reliable.

¹¹ Mrs. Tassano recalled the incident occurred in early November, but the sequence of undisputed events suggests that Mr. Tassano's timing is more accurate.

¹² Ms. Wheeler was the only employee to host a union meeting in her home. The meeting, which was held on December 13 and attended by five employees, had originally been planned for Steven Deaver's home but had to be relocated shortly before the meeting date. It is not clear from Mr. Lepape's testimony whether he learned that the meeting was yet to be held or that it had been held, but, since he knew of it before Ms. Wheeler's discharge, it is reasonable to infer that Mr. Lepape learned of the union activity and the meeting shortly before December 14.

¹³ Mr. Tassano speculated that Ms. Wheeler had defaced the photographs because of residual resentment over the past discharge of her

tograph defacement incident precipitated a domestic crisis between Mr. and Mrs. Tassano. Mrs. Tassano became particularly upset at having been targeted and her distress was compounded by the fact that only one employee had thanked her for her efforts in preparing food and gifts for a company Christmas party. Mr. Tassano was also upset and felt he had to take some action. Mr. Tassano testified that while he did not fire Ms. Wheeler because of the defacement, the circumstances “got the blood to boil a little bit higher than it was.”

On December 15, Mr. Tassano’s ire continued to build. At an employee meeting held that morning (which Ms. Wheeler, on an excused absence, did not attend), Mr. Tassano chastised the staff for their ingratitude to Mrs. Tassano and circulated the photographs of the Cygal job for employees to see. Later that afternoon, Mr. Tassano told Ms. Wheeler he was firing her. When Ms. Wheeler asked the reason, Mr. Tassano told her he had just seen the pictures from the Cygal job, and he could not trust her to spray anymore.

Ms. Wheeler asked, “The job I did almost a year ago?”

Mr. Tassano said, “Yeah.”

Ms. Wheeler told Mr. Tassano that he was “some piece of work” and that she hoped he could live with himself and his lack of integrity. Mr. Tassano gave Ms. Wheeler her final check and told her to clear out her truck and locker, which she did.

According to Mr. Tassano, he fired Ms. Wheeler because he could no longer trust her performance as an applicator, a decision that was spurred by his belief that she had defaced his wife’s image in a group photograph.¹⁴

IV. DISCUSSION

The question of whether the Respondent violated Section 8(a)(3) in terminating Ms. Wheeler rests on its motivation. The Board has established an analytical framework for deciding cases turning on employer motivation. *Wright Line*, 251 NLRB 1083, 1089 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). To prove an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee’s protected conduct was a motivating factor in the employer’s decision. If the General Counsel makes such a showing, the burden of persuasion shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Wright Line* at 1089. The burden shifts only if the General Counsel establishes that protected conduct was a “substantial or motivating factor in the employer’s decision.” *Budrovich Contracting Co.*, 331 NLRB 1333 (2000). Put another way, “the General Counsel must es-

son, because the offense seemed more likely to have been committed by a woman than a man, and because Ms. Wheeler had, deviously in his view, attributed responsibility to Dylan Smith whom Mr. Tassano considered irreproachable. Ms. Wheeler denied any culpability in the defacement.

¹⁴ Although Respondent presented evidence of additional examples of Ms. Wheeler’s deficiencies, i.e., frequently overflowing her water tank and a November refusal by customer, Shelley Gee, to accept Ms. Wheeler’s services, the Cygal job was clearly the sine qua non of Mr. Tassano’s discharge decision.

tablish that the employees’ protected conduct was, in fact, a motivating factor in the [employer’s] decision.” *Webco Industries*, 334 NLRB 608, fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). The General Counsel has established these elements herein. First, the General Counsel demonstrated that Ms. Wheeler engaged in union activity by contacting the Union, talking to other employees about the Union, and hosting a union/employee meeting at her house. Second, the General Counsel proved knowledge through Mr. Tassano and Mr. Lepape’s acknowledgment that they knew of employees’ union activities and Mr. Lepape’s admission that he believed Ms. Wheeler was “driving” the organizational effort. Although Mr. Tassano denied knowing that Ms. Wheeler had a catalyzing role in the union activity, I have not accepted his denial, and Mr. Lepape’s knowledge may be imputed to the Respondent. *State Plaza, Inc.*, 347 NLRB No. 70 (2006).¹⁵ Third, the General Counsel has presented convincing, albeit circumstantial, evidence of the Respondent’s antiunion animus. Inferences of animus may be drawn from circumstantial evidence as well as from direct evidence. *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home*, 321 NLRB 366, 375 (1996). The Board has drawn inferences of unlawful motivation from such circumstantial evidence as the pretextuality of an employer’s stated reason for discharge. See e.g., *State Plaza, Inc.*, supra; *Whitesville Mill Service Co.*, 307 NLRB 937 (1992); *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enf’d. 976 F.2d 744 (11th Cir. 1992); principle affirmed in *Diamond Electric Mfg. Corp.*, 346 NLRB No. 83 (2006); *Tidewater Construction Corp.*, 341 NLRB 456, 458 (2004) (inferring animus from pretext).

The Respondent essentially based Ms. Wheeler’s discharge on her herbicide misapplication at the Cygal property and on Mr. Tassano’s belief that she defaced his wife’s photographs.¹⁶ Unquestionably, Ms. Wheeler caused catastrophic and costly damage to the Cygal property for which the Respondent could justifiably have fired her. Ms. Wheeler caused the damage on March 21; by mid-April, Mr. Lepape had detailed the damages to Mr. Tassano, by late May, Mr. Tassano knew the damage estimate was \$2229, by mid-June, Mr. Tassano had compensated Mr. Cygal \$2229 for the damages, and by mid-October, Mr. Tassano was aware the Amador County Department of Agriculture proposed to fine the Respondent \$2400 for the misapplication. On none of those occasions did the Respondent seek to discharge or even to discipline Ms. Wheeler. On the contrary, Mr. Tassano pardoned the blunder, declined Ms. Wheeler’s offers of reimbursement, and in October urged her to resume herbicide spraying. It was not until Mr. Tassano learned of Ms. Wheeler’s union activity in December that the pardon-

¹⁵ The Board has also inferred knowledge when the reasons for discharge are so baseless, unreasonable, or contrived as to denote unlawful motivation. *Montgomery Ward*, 316 NLRB 1248, 1253 (1995). Such an inference is warranted here.

¹⁶ Although the Respondent also argued that other misapplications and work errors contributed to the discharge decision, it is clear that the Respondent focused on the Cygal property damage and the photograph defacement as deciding factors in the discharge.

able became unpardonable. While Mr. Tassano ascribed his volte face to having, for the first time, seen photographs of the damaged Cygal property, I cannot accept that. Certainly the photographs dramatized the damage, revealing sere and barren expanses where decorative vegetation had once apparently flourished. However, Mr. Tassano was no novice at the pest control business, and he must have been generally, if not specifically, aware of what kind of damages a \$2229 bill entailed. Moreover, Mr. Tassano saw the Cygal job photographs on December 1, but said nothing to Ms. Wheeler about them for 2 weeks even though, by his account, his blood was boiling. Timing is a significant factor in ascertaining motive. See, e.g. *LB&B Associates, Inc.*, 346 NLRB No. 92 slip op. at 2 (2005); *Desert Toyota*, at slip op. 3; *Detroit Paneling Systems*, 330 NLRB 1170 (2000). Given the months-long gap between damage and discipline herein, the only reasonable inference to be drawn is that something other than Ms. Wheeler's long-past spraying debacle brought Mr. Tassano's blood to the boil. Ms. Wheeler's damage to the Cygal property having been long resolved, the only notable circumstances at the Respondent's facility at the time of Ms. Wheeler's discharge were the defacement of Mrs. Tassano's photographs and Ms. Wheeler's union activity.

Turning to Mr. Tassano's suspicion that Ms. Wheeler defaced Mrs. Tassano's photographs, which hardened his resolve to discharge her, Mr. Tassano does not suggest that any actual evidence supported his belief. The lack of such proof does not, however, decide the matter. "Absent a showing of anti-union motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all without running afoul of the labor laws." *Neptco, Inc.*, 346 NLRB No. 6, slip op. at 2 (2005).¹⁷ However, the Respondent "must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged [her]." *McKesson Drug Co.*, 337 NLRB 935, 936 fn. 7 (2002); see also *Midnight Rose Hotel & Casino, Inc.*, 343 NLRB 1003, 1005 (2004) (employer must establish, at a minimum, that it had reasonable belief of employee misconduct); *Yuker Construction*, 335 NLRB 1072 (2001) (discharge based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *GHR Energy*, 249 NLRB 1011, 1012-1013 (1989) (demonstrating reasonable, good-faith belief that employees had engaged in misconduct sufficient). The question, therefore, is whether Mr. Tassano believed in good faith that Ms. Wheeler had defaced the photographs. I cannot find that he held any such good-faith belief. Although Mr. Tassano questioned a couple of employees about the vandalism, no one cast suspicion on Ms. Wheeler, and Mr. Tassano never broached the subject to her. Even when he fired Ms. Wheeler, although assertedly his suspicions made his "blood boil a little bit higher," Mr. Tassano said nothing about the defaced photographs. The only reasonable inference to be drawn from his silence on the subject is that Mr. Tassano did not sincerely believe Ms. Wheeler was responsible. The evidence thus estab-

lishes that the Respondent's stated reasons for discharging Ms. Wheeler are pretextual.

Since neither the herbicide misapplication at the Cygal property nor the photograph defacement provoked Ms. Wheeler's discharge, process of elimination justifies an inference that the only remaining circumstance, Ms. Wheeler's union activity, prompted the Respondent's action. See *State Plaza, Inc.*, supra; *Construction Products, Inc.*, 346 NLRB No. 60 (2006); *Grant Prideco, L.P.*, 337 NLRB 99 (2001). The pretextuality of the Respondent's charges against Ms. Wheeler support an inference that animus toward Ms. Wheeler's protected activities was the motivating factor in the Respondent's decision to discharge her. The General Counsel has, therefore, met his Wright Line burden, and the Respondent has not established persuasively by a preponderance¹⁸ of the evidence that it would have (not just could have) discharged Ms. Wheeler even in the absence of her union activity. *Desert Toyota*, 346 NLRB No. 3, slip op. at 2-3 (2005); *Webco Industries*, 334 NLRB 608, fn. 3 (2001); *Avondale Industries*, 329 NLRB 1064, 1066 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995). Accordingly, I find that by discharging Ms. Wheeler on December 15, the Respondent violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent violated Sections 8(a)(3) and (1) of the Act on December 15, 2005 by discharging employee Kirtlye Wheeler.
4. The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employee Kirtlye Wheeler on December 15, 2005, it must offer her reinstatement insofar as it has not already done so and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension and/or discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

¹⁷ Citing *Midwest Regional Joint Board v. NLRB*, 564 F.2d 434 (D.C. Cir. 1977).

¹⁸ A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1st ed. 1954).

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recom-

ORDER

The Respondent, Foothill Sierra Pest Control, Inc., Sonora, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging any employee for engaging in union or other concerted protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, insofar as it has not already done so, offer full reinstatement to Kirtlye Wheeler to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Kirtlye Wheeler whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Expunge from its files any reference to the unlawful discharge of Kirtlye Wheeler and thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Sonora, California copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 32 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices

mended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 15, 2005.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, DC November 22, 2006

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT discharge any of you for supporting General Teamsters Local 439 or any other union.

WE WILL NOT In any like or related manner interfere with, restrain, or coerce any of you in the exercise of the rights listed above.

WE WILL offer full reinstatement to Kirtlye Wheeler to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Kirtlye Wheeler whole for any loss of earnings and other benefits resulting from her discharge.

WE WILL remove from our files any reference to the unlawful discharge of Kirtlye Wheeler, and

WE WILL notify her in writing that this has been done and that the discharge will not be used against her in any way.

FOOTHILL SIERRA PEST CONTROL, INC.